United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7373

To be argued by
Arnold Davis.

IN THE

United States Court of Appeals

For the Second Circuit.

JODY A. MILLER and JOSEPH MILLER,
Plaintiffs-Appellants,

vs.

WALTER ZAJAC,
Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE.

GEORGE S. EVANS,
Attorney for Defendant-Appellee,
c/o EUGENE H. LIEBER,
27 William Street,
New York, N. Y. 10005
(212) 943-2690.

ARNOLD DAVIS,
EUGENE H. LIEBER,
Of Counsel.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-8076—8077

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against

WALTER ZAJAC,

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Statement.

This brief is submitted on behalf of defendant-appellee in this diversity action based upon plaintiff Jody A. Miller's claim of negligence in the operation of defendant's motor vehicle. The jury's verdict, delivered in favor of the defendant, was (JA 323-1):

> "Your Honor, we find in favor of the defendant, Walter Zajac. *We find no negligence on his part.*" (Emphasis supplied.)

The Facts.

Plaintiff, Jody A. Miller, was a passenger in the front right seat of defendant's Toyota motor vehicle, on August 31, 1972 (JA 21, 25, 26). The car was equipped with seat belts and shoulder harnesses, none of which the said plaintiff used (JA 220-221, 76-78, 227).

Defendant operated his vehicle at about 40 miles per hour (JA 230) on a two-way (JA 228), 15-foot-wide (JA 257), level road when he was confronted by a turn to his right (JA 230). He saw no posted caution signs, speed limit signs or signs indicating sharp turns (JA 229). The roadway was poorly lit (JA 229). As he approached the curve, he saw an animal in the curve of the road, about 50 to 60 feet in front of him (JA 230-231). He pulled toward his left in an attempt to by-pass the animal and applied his brake (JA 231). About 40 feet from the point where his evasive maneuver started, his car left the roadway, went across a trough-like gravel shoulder (JA 259) and travelled along wet grass to the left of the gravel (JA 232). He tried to steer back onto the road (JA 232); however, the car did not respond completely (JA 232) and he could feel that it was not going where he wanted it to go (JA 260). The car came into contact with a pole (JA 233) located about 50 feet from the point where he had left the roadway (JA 255). He was traveling about 15 miles per hour at the time of contact (JA 242). A state trooper, who responded to the scene, confirmed that the vehicle had travelled some 120 feet to the point of contact, on the basis of tire marks on the road and the car's path of travel as seen by him (JA 276-277). The trooper also testified (JA 276):

> "Q. Of your own recollection, do you recall what it was that you reduced to writing as to what he [Zajac] told you? A. The operator advised me that he had swerved to avoid a deer."

Plaintiff did not particularize the crash other than to relate that "Walter went off the road and we went skidding into a pole, head on" (JA 36). At some time interval prior to defendant's entry into the curve, plaintiff recalled a back-seat passenger to have commented that: "We were going too fast" (JA 78). Up to that point,

plaintiff thought that defendant "was driving fine" (JA 81). Between the interval of the said passenger's complaint and defendant's entry onto the curve in the road, plaintiff claiming to have been aware of "screeching" and "swaying" (JA 79, 82) did nothing to protest the manner of defendant's driving. Moreover, she offered no rebuttal to defendant's claim of having suddenly come upon the animal in the curve.

POINT ONE.

There was no error, fundamental or otherwise, in the court's failure to charge the doctrine of *Pfaffenbach v. White Plains Express Corp.*, 17 N. Y. 2d 132 (1966).

Appellant proceeds on the premise that it was fundamental error for the trial court to have failed to instruct the jury concerning the doctrine of *Pfaffenbach v. White Plains Express Corp.*, 17 N. Y. 2d 132 (1966). She argues that the jury was ill-equipped to deal with the matter submitted to it, not having been advised that it could find defendant negligent merely from the fact that his motor vehicle left the roadway and made contact with a pole.

The jury's verdict, succinct indeed, declared (JA 323-1):

> "* * * 'Your Honor, we the jury, find in favor of the defendant Walter Zajac. *We find no negligence on his part.*' * * *" (Emphasis supplied.)

In its decision on appellant's post-trial motion, the trial court acknowledged that, prior to the commencement of the trial, plaintiff's counsel had telephoned the court's law clerk indicating a list of references which included PJI 2:84A (1 *New York Pattern Jury Instructions*, 2d Ed. [1974]) (JA 349). At the trial, the request

was not reiterated and no exception was taken to its omission from the charge (JA 349; JA 322-323).

Actually, there was no error in the charge, the jury having found defendant to have been free from any negligence on his part. The verdict is rooted in the record.

On defendant's direct case, he testified to having operated his vehicle at a rate of 40 miles per hour (JA 230) on a two-way (JA 228), 15-foot-wide (JA 257), level road when he was confronted by a turn to his right (JA 230). He saw no posted caution signs, speed limit signs or signs indicating sharp turns (JA 229). The roadway was poorly lit (JA 229). He continued (JA 230-233):

> "Q. Did something occur as you were approaching that curve or in the curve? A. Yes, I saw an animal in front of me standing there and I tried to avoid it.
>
> "Q. Had you seen where the animal came from? A. It was just standing there on the right-hand side, just as we entered the curve.
>
> * * *
>
> "Q. Can you give us some idea of what this animal appeared like to you when you saw it? A. It appeared like a deer.
>
> "Q. Approximately where were you with respect to that deer when you first saw it, how far away? A. 50 to 60 feet.
>
> "Q. What did you do when you first saw the deer? A. I pulled over to the left-hand side, trying to by-pass it, go around it, and I applied my brakes.
>
> * * *
>
> "Q. Did your car go off the roadway at some point? A. Yes, it did.
>
> "Q. Can you give us any idea how far you travelled from the point where you applied your brakes

and swerved to the point where you left the roadway, if you know? A. Maybe 40 feet.

* * *

"Q. Did your car at any time up to the point of the accident go into a field to the left of the gravel? A. No, it did not.

"Q. Did your car go onto the gravel? A. Yes, it did.

"Q. Did it go onto the grass which was to the left of the gravel? A. Yes, it did.

"Q. What did you notice about the grass, if anything, as you were moving along? A. It was wet. It seemed to have dew.

"Q. Were you applying your brakes as you were traveling along on the grass off the roadway? A. Yes, I was.

"Q. Did you at any time depress the brake fully to the floor? A. No, I did not.

"Q. Did you do anything after you left the roadway with respect to your steering? A. I tried to steer back on the road.

"Q. Did the car respond? A. Not completely.

"Q. Did it continue generally in a forward direction? A. Yes, it did.

"Q. Did the car come in contact with something at some point? A. Yes, it did.

"Q. With what? A. A pole.

* * *

"Q. Did your car come to a stop at the pole? A. Yes, it did."

He was traveling at about 15 miles per hour at the time of contact (JA 242).

On cross-examination, defendant confirmed that when he saw the animal in the curve it was standing to his right, in the curve of the road (JA 252-253) and that he had applied his brake at that point (JA 254). The car traveled about 50 feet before it left the roadway (JA 255). To his left there was a two or three-foot-wide

gravel shoulder and then grass (JA 257). The gravel was sort of like a trough (JA 259). Asked about having skidded due to wet grass, he continued (JA 260):

> "I did not skid. When I got onto the grass, when I was driving, when I was pulling the car to the right, I could feel that it wasn't going where I wanted it to go. That is what I meant by uncontrolled skid, is when I pulled the car to the right, she was not reacting."

He travelled about 50 to 60 feet before he left the roadway and another 50 to 60 feet to the point of contact with the pole (JA 262).

On direct examination, defendant described the damage to his vehicle (JA 237-238):

> "Q. Was there any damage to that front bumper? A. Yes, there was.
> "Q. Can you describe it for the jury? A. There was damage on the left-hand side where I had come into contact with the pole.
> "Q. Was the center of that front bumper indented in any way? A. No, it was not.
> "Q. Can you describe the condition of the bumper at the right front? A. It was slightly out, I believe, because of the impact. It was hit on this side and this side sort of bumped out a little bit.
> "Q. You mean out forward from the front of the car? A. Yes, it was.
> "Q. Was there any damage to the hood of the car? A. The hood was okay, it just jumped out of its—it sort of has a lock right where the window pane is and it sort of jumped out.
> "Q. Was the impact with the pole anywhere in the area of the left front wheel? A. Yes, it was.
> "Q. Can you tell us, describe for us the condition of that left front wheel after the accident? A. It was deflated.
> "Q. Was it moved in any direction? A. Yes, it was.

> "Q. In which direction? A. Into the car, towards me."

The described damage was confirmed on cross examination (JA 263).

John J. Hayes, Jr., a state trooper who had responded at the scene of the accident (JA 273), testified (JA 276):

> "Q. Of your own recollection, do you recall what it was that you reduced to writing as to what he [Zajac] told you? A. The operator advised me that he had swerved to avoid a deer."

His investigation indicated that the vehicle had travelled some 120 feet to the point of contact, on the basis of tire marks on the road and the path of travel up to the pole (JA 276-277). *The witness was not cross examined concerning this portion of his testimony.*

The only evidence contrary to that of defendant came from plaintiff herself. She claimed that the road was "curvy" (JA 34), that the car swayed as it went around curves and that a passenger had told defendant to "slow down" (JA 35). She could not particularize the crash excepting to note that "Walter went off the road and we went skidding into a pole, head on" (JA 36). She claimed a "heavy impact" (JA 37). She was silent to offer any testimony concerning the presence or absence of a startling road obstruction, either on her direct case or in rebuttal.

The jury heard plaintiff's claims that she was laid out on the ground, following the crash, screaming in pain (JA 38) and that, after reaching a neighboring house, she was laid out on the floor and covered with a blanket (JA 39). She recalled being thrown from her seat onto the floor and having been pinned between the seat and

the floor (JA 37-38). Thereafter, she felt an extreme twisting, stabbing pain in her back (JA 40). She was taken to Ellenville Hospital (JA 46) and later that day she was transferred to Orange Hospital (JA 47, 87), where she stayed for some 10 days (JA 47). She recalled constant tightness and pain in her back and that she was fitted with a back brace before her discharge (JA 49), which device she wore for about three months (JA 54). Other than for walking and sleeping, she did not engage in any physical activities through June, 1973 (JA 62). During the summer of 1973, she went to California where she worked as a nurse's aide, "giving enemas, washing bed pans, you know, bed baths" (JA 64). She was careful and her back did not give her a lot of trouble (JA 65). During Christmas of 1973, after her return home and because of cold weather "annoyance" of her back, she returned to California (JA 66), where she found that employment in a plant nursery did not aid her continuously sore and throbbing back (JA 68). In September, 1974, she entered Monterey Peninsula College (JA 69). She claimed to still have continual back pain and that she came under the care of a California physician when her back "went out" as she was getting out of her car (JA 69), in which doctor's care she claimed to continue up to the time of the trial (JA 70).

On cross-examination, however, the jury heard plaintiff admit that, between the date of her discharge from the hospital, in the beginning of September, 1972, up to the end of December of that year, she saw her doctor only three times (JA 91-92); and that she saw him only once more, thereafter, in March, 1973 (JA 92). Her high school health record (Ex. E) indicated a completely negative medical evaluation on March 27, 1973 (JA 340). She admitted that, while she considered her back condition to be a "physical disability," she denied any such disability in a 1973 application for a New Jersey driver's

license (JA 95-96) and that she probably did not advise the California authorities of any disability when she applied for a driver's license in April, 1974 (JA 100). She admitted that, in her application for admission to Monterey Peninsula College *and* her spring, 1975 re-registration, she had signified that she had no physical condition limiting her activities (JA 101-104; Ex. C, JA 333). She admitted having completed a course in archery (JA 104). She admitted that, as a nurse's aide in July, 1973, she would be involved with lifting patients and that she made no complaints upon a physical examination in connection with that employment (JA 107-108). Her record of emergency room treatment at Monterey Hospital (Ex. D) indicated that her back complaints referred to a mid-thoracic back condition (JA 335) while her claims at bar were confined to an injury lower down and involving her lumbar area (JA 156, 166, 174, 210-211).

The jury had every right to reject the testimony of plaintiff on the basis that she had impeached her own credibility through exaggeration of her claims. It had every right to reject her claim that a passenger had complained that defendant should slow down his vehicle (just prior to the accident) (JA 3[illegible]), a point in time up to which plaintiff felt that defendant was "driving fine" (JA 82).

On the other hand, there was ample material in the record from which the jury could find, as it had, that defendant was without negligence in the occurrence.

This court, just recently, in *Elliott v. Maggiolo Contracting Co., Inc* (2 Cir. 1975), F. 2d (not yet officially reported, N. Y. Law Journal, Sept. 26, 1975, p. 1), restated, concerning the province of the jury on the evaluation of disputed testimony:

> "* * * Determination of disputed facts and conclusions concerning the credibility of conflicting testimony are functions solely within the province of the jury:
>
> "'Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.'
>
> "*Lavender v. Kern*, 327 U. S. 645, 653 (1945). * * *"

There was no error in the weight of evidence affecting the verdict and appellant cannot fault the jury at bar.

Appellant, however, has assigned other error and argues that the jury was inadequately instructed by reason thereof.

It was not error, fundamental or otherwise, for the trial court to have omitted from its charge an instruction as suggested by the *Pfaffenbach* case. The requested instruction was presented to the court prior to the commencement of the trial. Thereafter, defendant testified, affirmatively, at the trial. No exception was taken to that portion of the charge which omitted a *Pfaffenbach* instruction. Plaintiff's counsel may well have abandoned his request at that point.

Of particular note concerning the *Pfaffenbach* instruction is that it permits, *but does not compel,* the inference of negligence from defendant's operation of his vehicle. The model instruction concludes (PJI 2:84A):

> "* * * If you find that the car did not leave the road as a result of defendant's failure to exercise reasonable care, your finding will be that he was not negligent."

In *Livaccari v. Zafonte,* 48 A. D. 2d 20 (1975), alluded to by appellant, the majority court faced a plaintiff's verdict in a case where the *Pfaffenbach* instruction was given and where the defendant testified in her behalf. The dissenting court asserted that it was error to include the instruction, calling for an inference of negligence, in a case where defendant had testified. It distinguished *Pfaffenbach,* suggesting that its rule applied only where a defendant chose to remain silent, thus leaving an insurmountable burden upon the absent party to show the cause of the accident (48 A. D. 2d 20 at p. 25). The majority court, acknowledging that in the death action before it plaintiff was entitled to a relaxed degree of required proof under *Noseworthy v. City of New York,* 298 N. Y. 76 (1948), concluded that the jury had a right to reject the defendant's testimony and that it could, thereupon, fall back on the *Pfaffenbach* inference of negligence.

Simmons v. Stiles, 43 A. D. 2d 417 (1974), vigorously forwarded by appellant, concludes that rejection of a *Pfaffenbach* instruction is fundamental error. That case, however, involved a defendant who was a victim of amnesia which deprived him of any recollection of the accident.

It appears that prior to *Livaccari v. Zafonte, supra,* the reported authorities involving the *Pfaffenbach* inference all involve a "silent" defendant. At bar, preserved in a public record and confirmed at the trial by the state trooper, was defendant's *ante litem motam* statement that he was suddenly faced with an animal in the roadway (JA (272).

Unlike *Livaccari,* the jury at bar *affirmatively* found defendant to have been free of negligence. This is a far

cry from a dismissal by reason of an insufficiency of plaintiff's proof, a circumstance sought to be remedied by *Pfaffenbach.*

In seeking to avoid the consequences of plaintiff's failure of timely exception to the omission of the *Pfaffenbach* instruction, *a request not specifically rejected,* appellant asserts a claim of fundamental error and argues that review of such an issue may be had in this court. Granting the power of review *in a proper case,* it is submitted that the matter at bar fails to fulfill the requisites of such an instance.

In *Cohen v. Franchard Corporation* (2 Cir., 1973), 478 F. 2d 115, cert. denied 414 U. S. 857, this court said at page 124:

> "* * * Our court and other courts of appeal have recognized an exception to the rule that, absent objection in the district court, an appellate court necessarily is precluded from considering alleged errors in the jury charge. An appellate court on its own initiative may reverse *on the ground of plain error* in a jury charge that was not objected to when *such reversal is necessary to correct a fundamental error or to prevent a miscarriage of justice. Curko v. William Spencer & Son, Corp.,* 294 F. 2d 410, 413-14 (2 Cir. 1961); *Delancy v. Moticheck Towing Service, Inc.,* 427 F. 2d 897, 901 (5 Cir. 1970); *Ramsey v. Travelers Ins. Co.,* 317 F. 2d 300, 302 (4 Cir. 1963). Upon our own initiative, therefore, we turn to the question of whether the judgment entered on the jury verdict below should be reversed on the ground that the court's charge on reliance and its failure to charge on Franchard's imputed knowledge were plain error." (Emphasis supplied.)

Following rejection of invocation of the plain error rule, the court continued (at p. 125):

> "Intervention by us to correct such questionable errors under the plain error doctrine would undercut the salutary rule that claims must be raised in and ruled upon by the trial court before they are ripe for appellate review. As Professors Wright and Miller have stated, '[i]f there is to be a plain error exception to Rule 51 at all, *it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.*' 9 Wright & Miller, Federal Practice and Procedure, §2588, at 675 (1971)." (Emphasis supplied.)

In *Blier v. United States Lines Co.* (2 Cir. 1961), 286 F. 2d 920, where the court gave consideration to a claim of fundamental error, Medina, J., wrote (at p. 922):

> "* * * In such a case we clearly have power to decide *on the whole trial record* whether the likelihood of a miscarriage of justice is such as to warrant a review of the 'error,' even in the absence of objection or exception at the trial. * * *" (Emphasis supplied.)

A review of the whole trial record fails to demonstrate a miscarriage of justice or any unfairness below. Nor is this an *exceptional* case which demands relaxation of Rule 51 standards (*Troupe v. Chicago, D. & G. Bay Transit Co.* [2d Cir. 1956], 234 F. 2d 253, at 259-260).

The affirmative proof below more than adequately supports the jury's affirmative finding of no negligence on defendant's part.

POINT TWO.

The New York doctrine governing "emergency situations" was applicable at bar. The instructions were clearly and fairly delivered to the jury.

The evidence below demonstrates that just as the defendant entered a curve in the road, he observed a deer standing some 50 to 60 feet in front of him, in the roadway (JA 230-231). He applied his brakes, moved to his left, and, at a point some 40 feet from the start of his evasive maneuver, defendant's vehicle left the roadway, passed over a gravel shoulder and travelled on wet grass for another 50 to 60 feet until it came into contact with a pole at which time he was traveling at a rate of about 15 miles per hour (JA 231-233; 262). The wetness of the grass prevented the vehicle from responding to defendant's efforts to control its path (JA 260).

Defendant's testimony was not contradicted by plaintiff, either on her direct case or in rebuttal. Defendant testified that he was proceeding at 40 miles per hour (JA 230) when he first sighted the deer, some 50 to 60 feet in front of him. At that rate, his vehicle was moving some 58.6 feet per second. In that short time interval, defendant had to react to the unexpected and to begin an evasive maneuver. In about one second from his first sighting of the animal, defendant's vehicle left the roadway. He travelled at a rate of about 15 miles per hour at the time that he struck the pole, or a rate of about 22 feet per second, indicating a constantly decelerating rate of speed. Assuming, *arguendo,* that he was moving at the lowest rate of 15 miles per hour *at* the time that he left the road, it took less than three seconds for defendant to reach the pole. The whole episode took less than five seconds from start to finish.

Appellant argues that, when defendant left the road without striking the animal, his emergency ended. The "new" peril is described as a telephone pole. To bolster the contention, appellant alludes to *Middlebrook v. Auletta,* 15 N. Y. 2d 501 (1964). The Court of Appeals memorandum opinion notes that there was affirmative testimony that defendant's vehicle was 100 feet from a dog in the roadway when plaintiff called the driver's attention to the confrontation and that defendant took no steps to avoid the animal until he was but 20 feet from it. It is interesting to note that the dissenting Appellate Division justice (20 A. D. 2d 705, at 706) (with whose opinion the reversing Court of Appeals apparently agreed) found that two authorities cited by his majority court involved "defendants [who] responded to emergencies without delay." *Appellant's brief concedes that defendant was involved in an emergency situation when confronted by the animal in the roadway.* Defendant's "further" peril was no more of his creation than the emergency created by the animal. There was his affirmative testimony that (JA 260):

> "* * * When I got onto the grass, when I was driving, when I was pulling the car to the right, I could feel that it wasn't going where I wanted it to go. That is what I meant by uncontrolled skid, is when I pulled the car to the right, she was not reacting."

The uncontradicted evidence below was that defendant made every attempt to return his vehicle to the roadway, but, that conditions beyond his control prevented him from so doing. What appellant has tendered as "separate" perils were all a part of the same scenario.

There was no error in the charge concerning emergency and the same conformed in all respects to PJI 2:15 (JA 337-338), as requested by defendant (JA 14).

It is firmly settled New York law that when faced with an emergency, without opportunity for deliberation, thought or consideration, an ensuing accident may be "within the field of nonliability" (*Rowlands v. Parks,* 2 N. Y. 2d 64, 67 [1956]).

To the same effect, please see:

Kokofsky v. City of New York, 297 N. Y. 552 (1947);
Allenson v. Furman, 16 A. D. 2d 629 (1962);
Bobbe v. Camato, 26 A. D. 2d 627 (1966);
Friedman v. Coca-Cola Bottling Co., 26 A. D. 2d 554 (1966), affd. 19 N. Y. 2d 756 (1967).

The facts below amply demonstrate that defendant was confronted by an unforeseen and unanticipated animal and that he did not contribute to the emergency from which he sought to extricate himself. There was ample below to justify the trial court's charge of the emergency rule (*Jones v. National Biscuit Co.,* 29 A. D. 2d 1033, 1034 [1968]).

In an effort at assigning error, appellant argues that the court below "virtually directed the jury to find that an emergency situation did exist" (app. brief, p. 14). The instruction, without benefit of appellant's paraphrasing, left it to the jury to determine (1) whether defendant was faced with an emergency, (2) whether the emergency was created or contributed to by defendant's own negligence and (c) if not created or contributed to by defendant, whether he acted as would a reasonably prudent person under the same emergency circumstances (JA 312-313). The jury's function was not usurped.

POINT THREE.

The charge to the jury was neither inadequate nor prejudicial.

The charge has been attacked on several grounds.

1. The trial court was under no obligation to discuss the facts with the jury.

The trial below did not cover an inordinate length of time nor were the issues complicated. The jury was advised of plaintiff's claim of defendant's negligence and of defendant's contention that he was not negligent (JA 308). The instructions of law were rooted in the evidence.

The discretion of the federal trial judge in his charge to the jury is broad, indeed. In *United States v. Tourine* (2 Cir. 1970), 428 F. 2d 885, cert. den. 400 U. S. 1020 (1971), this court said, at page 869:

> "The trial judge in a federal court *may* summarize and comment upon the evidence and inferences to be drawn therefrom, in his *discretion.* * * *" (Emphasis supplied.)

To the same effect, please see:

> *Radiation Dynamics, Inc., v. Goldmuntz* (2 Cir. 1972), 464 F. 2d 876, 889.

In *General Dynamics Corporation v. Adams* (5 Cir. 1965), 340 F. 2d 271, the court observed, at page 277:

> "* * * The charge may be, as it was here, a statement of legal principles, without a discussion of the specific contentions made by appellant by way of defense. * * *"

Appellant refers to *Green v. Downs,* 27 N. Y. 2d 205 (1970), claiming that a New York court must discuss the evidence and relate it to the principles of law charged. It is submitted, however, that such state doctrine does not operate to divest a federal trial judge of his aforesaid discretion (*Nudd v. Barrows,* 91 U. S. 426, 442 (1875); *Lincoln v. Power,* 151 U. S. 436, 442-443 [1894]).

2. The evidence justified a charge on contributory negligence.

Appellant argues that, as a matter of law, she could not have been contributorily negligent. The evidence lends an opposing conclusion.

On cross-examination, plaintiff testified that before defendant entered the curve she had heard another passenger, Natalie, comment that "we were going too fast" (JA 78). Up to that comment, plaintiff thought that defendant "was driving fine" (JA 82). She continued (JA 81-82):

> "Q. When you heard Natalie say that the car was going too fast, had you already reached the curve in the road where the accident took place?
>
> * * *
>
> "A. I don't think we were at the curve, no.
>
> "Q. Can you give us some idea where you were with relation to that curve when you heard Natalie make her comment? A. I couldn't give it to you exact. It was soon, very soon *before* that curve, but I can't give you exact.
>
> "Q. A matter of seconds? A. *I really couldn't say.* It's hard.
>
> "Q. When you heard Natalie make that comment, what did you do or say, if anything? A. *I didn't say anything.*
>
> "Q. Were you, yourself, aware of the screeching and the swaying before she made the comment?

A. *It happened after. I noticed it after she made the comment.*

"Q. Up until that point you had noticed nothing. A. No. He was driving fine.

"Q. When you reached the curve in the road where this accident happened, did you feel any swaying or hear screeching of wheels? A. Yes, *I did.*" (Emphasis supplied.)

The above exchange clearly indicates an interval to have elapsed between the point when plaintiff admitted having been made aware of defendant's speed and the time when his vehicle entered the curve and her admission that she did nothing during that interval to protest his action. Unlike the plaintiffs in those cases cited at page 21 of appellant's brief, appellant acknowledges that someone voiced a protest, thereby, calling to her attention that she should no longer rely upon her driver's discretion. The jury could have found that plaintiff should have done something during that interval to avert the danger apprehended by her following Natalie's comment. Under such circumstances, it was proper for the court to instruct on the subject of contributory negligence. However, the jury never reached the issue.

The charge relative to mitigation of damages by reason of plaintiff's failure to use a seat belt is based upon the evidence and the same conforms to New York substantive law (*Spier v. Barker,* 35 N. Y. 2d 444 [1974]). The assignment of error is specious, however, because the jury never reached the damages phase of the action. It affirmatively found defendant to have been without negligence in the occurrence.

CONCLUSION.

The judgment appealed from should be affirmed.

Respectfully submitted,

GEORGE S. EVANS,
Attorney for Defendant-Appellee.

ARNOLD DAVIS,
EUGENE H. LIEBER,
Of Counsel.